86-1423

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TINLEY PARK COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146; ROBERT W. PROCUNIER, Superintendent of Community Consolidated School District No. 146; and THE BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146,

Petitioners,

v.

KATHRYN M. JENNINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 3, 1987

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QUESTION PRESENTED

In a Title VII retaliatory discharge case, is a Defendant required to do more than produce a non-discriminatory reason to sufficiently meet part two of the test set forth in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981)?

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No.

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TINLEY PARK COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146; ROBERT W. PROCUNIER, Superintendent of Community Consolidated School District No. 146; and THE BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146,

Petitioners,

v.

KATHRYN M. JENNINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Tinley Park Community Consolidated School District No. 146; Robert W. Procunier, Superintendent of Community Consolidated School District No. 146 and the Board of Education of Community Consolidated School District No. 146, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 21, 1986.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals appears in the Appendix hereto. The District Court of the

Northern District of Illinois rendered oral findings, a transcript of which is part of the record below.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 21, 1986, affirming judgment in favor of the petitioner with regard to the underlying Title VII charge of sex discrimination in the payment of overtime and remanding the retaliation claim for a new determination. A timely petition for rehearing en banc was denied on December 5, 1986. The order denying the petition for rehearing appears in the Appendix hereto. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(l).

STATUTE INVOLVED

42 U.S.C. Sec. 2000e-3(a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The petitioners are a municipality, specifically, a school district and its Board of Education, and its chief administra-

tive officer, the Superintendent of Schools. The respondent was employed from 1973 through 1979 as the Superintendent's secretary.

In 1980, the respondent filed a First Amended Complaint on behalf of herself and other similarly situated female persons alleging sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. Respondent alleged that certain school district employment practices discriminated against women. Respondent also alleged that she was terminated from her employment in retaliation for her investigation of and opposition to employment practices prohibited by Title VII.

In 1982, the class was certified as consisting of all female secretarial employees of the school district, employed at any time after October 1, 1978, who were discriminated against on the basis of gender.

In 1983, the petitioners here were granted partial summary judgment leaving only two issues remaining, namely, whether the female secretaries were discriminated against with regard to the payment of overtime and whether respondent was terminated in retaliation for engaging in conduct protected under Title VII.

A bench trial was held by the United States District Court for the Northern District of Illinois in 1985. Upon a Rule 41(b) motion at the close of the respondent's case, the court allowed the respondent to submit further evidence. The court then dismissed the action on the merits on all counts. The order dismissing the case was entered by the District Court on May 3, 1985.

In due course, the respondents took an appeal to the Seventh Circuit Court of Appeals from the dismissal order of the District Court.

On July 21, 1986, the Seventh Circuit affirmed the dismissal of the claim which alleged sex discrimination in the school district practice of the payment of overtime wages. The Seventh Circuit remanded the retaliation claim for a new determination.

The Seventh Circuit identified the determinative issue as whether the petitioners articulated a *legitimate* business reason for the employment dismissal, without in any way articulating a standard or criteria of "legitimacy".

The facts upon which this case is based appear in the Seventh Circuit opinion appended hereto. However, since the focus of this petition for writ of certiorari is the new standard of legitimacy created by the Seventh Circuit, the following additional facts cited from the record are pertinent.

The record shows that the respondent shared a confidential relationship with the Superintendent of Schools as his personal executive secretary. Trust between the Superintendent and his personal secretary was a job requirement and that trust relationship had been established. The Superintendent referred to the respondent as "the one who makes me look good" and "my good right arm". (Tr. 98.)* The respondent often acted as the Superintendent's "eyes and ears" when he was absent from the school district (Tr. 121-27, 144-45), reporting, for example, that certain employees were absent from their offices before the end of the work day, their desks cleared and offices dark. (Tr. 133-134, 142-44.) The respondent answered the Superintendent's personal telephone as well as his business telephone. (Tr. 127.)

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* "R." refers to item in the record on appeal. "Tr." refers to the transcript of the proceedings at the trial court.

After attending meetings with the group of concerned secretaries, the respondent would meet with the Superintendent, deliver minutes of the meetings and orally inform him about the issues discussed. (Tr. 109-10.)

On occasion, respondent expressed her opinions or objections to the Superintendent regarding employment conditions, including those conditions she believed to be adverse because of sex discrimination. In 1978, respondent complained to the Superintendent concerning the alleged disparity between secretarial and custodial salaries, but received no sanction or objection as a result. (Tr. 169-71.) Respondent also resigned her position as recording secretary to the Board of Education on May 25, 1979, informing the Superintendent that she took this action to signify her objection to the "contempt" which the Board of Education held for the secretarial staff. (Tr. 180-81.) Respondent testified that she received no adverse employment action from the Superintendent on account of that criticism and complaint (Tr. 181-82), nor on account of any of her other expressions of opinions and complaints concerning actions of her employer. (Tr. 197-198; 283.) At no time prior to June 1, 1979 did the respondent experience any loss of trust or confidence from the Superintendent, or any other adverse employment action as a result of expressing her objections or opinions regarding employment conditions or perceived sex discrimination.

It is undisputed that respondent was aware within the week prior to June 1, 1979 that the Superintendent was assembling data to address some of the concerns of the secretarial employees about the equity of their wages and work conditions in the school district. (Tr. 183-84; R. 91, Stipulation No. 54.) During this same time period, unbeknownst to the Superintendent, respondent was also engaged in the drafting of the P.S. Salary Study, Plaintiff's Trial Exhibit 4. (Tr. 79; R. 91, Stipulation No. 36.) It is

further apparent that during this same time period, namely approximately May 31, 1979, the secretaries had decided not to deliver their Salary Study to the Superintendent but to go directly to the members of the Board of Education with it, a decision with which respondent agreed. (Tr. 80, 188, 334.) In fact, it is the testimony of one of the secretarial group that the delivery of the Salary Study directly to the Board members without going to the Superintendent was respondent's idea, in that "it would have more of an effect if we delivered it to the Board members". (Tr. 334-335.) Thereafter, on the afternoon of June 1, 1979, beginning at 2:00 p.m., members of the group of "concerned secretaries" delivered their P.S. Salary Study dated June 1, 1979 to the homes of the seven Board members who comprised the Board of Education of the School District. (R. 91, Stipulation No. 39.) Respondent did not deliver a copy of P.S. Salary Study to the Superintendent nor did she inform him of the actions of the secretarial group in preparing and distributing the P.S. Salary Study until later in the afternoon of June 1, 1979, at approximately 3:50 p.m. (R. 91, Stipulation No. 40.) She did this, notwithstanding the fact that respondent and the Superintendent had earlier conversed at 2:00 p.m. that same afternoon. (Tr. 188-89, 312-13.)

On June 13, 1979, the Superintendent met with respondent to discuss concerns he had as a result of the distribution of the P.S. Salary Study by the secretaries directly to Board members without so much as an advance warning. It is undisputed that during this conversation, the respondent, his personal secretary of six years, told the Superintendent that the Salary Study was delivered directly to the Board members without informing the Superintendent because she, as well as the other secretaries, did not trust the Superintendent with the document. (Tr. 196-197, 312-15.) In the context of their long standing relationship, the Superintendent

was understandably surprised at the revelation that his confidential secretary did not trust him enough with the documentation which was transmitted to the Board that she could not so much as inform him of the existence of the Salary Study in advance of its distribution. (Id.) As a result, he lost trust and confidence in respondent. He felt that they could no longer share the confidential relationship necessary for the proper functioning of his executive office. Thus, respondent was dismissed from employment.

The record is clear that it was not the content of the P.S. Salary Study which caused the Superintendent to lose trust and confidence in his secretary, the respondent. Rather, it was her failure to inform him in advance of the direct distribution of a document containing employee complaints to the Board of Education and her subsequent explanation that she, too, did not trust him to deliver any such document intact to the Board, which caused the Superintendent to feel that he could no longer trust his personal secretary. It was irrelevant that the document contained matters which secretaries believed to be indicative of sex discrimination.

The Seventh Circuit held at pages 10-12:

> We think that there is some reason to doubt whether defendant presented a legitimate, nondiscriminatory reason for the discharge. As the Ninth Circuit has noted, almost every form of opposition to an employment practice is in some sense disloyal. See *EEOC* v. *Crown Zellerbach Corporation*, 720 F.2d 1008, 1014 (9th Cir. 1983). If mere "disloyal" conduct could provide a legitimate basis for discharge, the protection extended by section 2000e-3 would be severely limited.

* * *

> Defendant also argues that plaintiff's actions were disruptive because they caused Procunier to lose trust in her. This argument is an attempt to say that "disloyal" conduct is always disruptive, and therefore a justification for discharge, at least so long as defendant claims that trust is a job requirement and he or she has lost trust. This argument, if adopted, would undermine section 2000e-3, in the same way that the argument that "disloyalty" justifies discharge would.
>
> * * *
>
> It is entirely possible that under all the circumstances Procunier showed a "legitimate" reason for the discharge. But, because a sense of "disloyalty" is inherent in almost any assertion of Title VII rights, we think it essential to determine whether the alleged disloyalty here constituted a legitimate business reason under the Crown Zellerbach test or was of a sort that is not cognizable as a defense to a retaliatory discharge claim.

For the above reasons, the case was remanded, with a strong dissent, with an instruction to the District Court to determine whether the petitioners articulated a *legitimate* business reason for the employment dismissal.

A petition for rehearing was timely filed by the petitioners. The same was denied by the Seventh Circuit on December 5, 1986.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S "LEGITIMACY" STANDARD REQUIRES THE DEFENDANT IN A TITLE VII RETALIATION CASE TO ESTABLISH MORE THAN A

NON-DISCRIMINATORY REASON TO EXPLAIN THE ADVERSE ACTION. THIS NEW REQUIREMENT SHIFTS THE BURDEN OF PERSUASION IN A TITLE VII CASE TO THE DEFENDANT, IN CONFLICT WITH THE STANDARDS OF *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS* V. *BURDINE*, 450 U.S. 248 (1981).

In direct contravention of this Court's opinion in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) the Seventh Circuit seeks to require the Defendant in a Title VII retaliatory discharge case to bear the Plaintiff's burden of persuasion. Not only must the Defendant articulate a non-discriminatory reason for the discharge, but the Seventh Circuit is now requiring the Defendant to prove the "legitimacy" of the reason. The "legitimacy" standard, however, is undefined.

The Seventh Circuit held that the District Court was in error in allowing the school district employer to articulate "any reason" as the non-discriminatory reason for the discharge. While recognizing that a non-discriminatory reason was stated by the Defendant which was found credible by the trial court, the Seventh Circuit found that the "legitimacy" of that reason was not sufficiently proven. Last, the Seventh Circuit observed that since disloyalty is inherent in most Title VII activities, the District Court must determine whether the non-discriminatory reason articulated by the employer, found credible by the District Court, is nevertheless legitimate enough. The District Court is directed to determine whether the non-discriminatory reason is a legitimate business reason.

The dissent in the Seventh Circuit opinion summarized thusly at pages 14-15:

> Contrary to the ruling case law, the majority's position would require the Defendant to establish something more than it discharged the Plaintiff for nondiscriminatory reasons . . . a nondiscriminatory reason *is* a "legitimate" reason sufficient to meet the Defendants' burden of production under part 2 of *Burdine*. In this case, the record is clear that the District Court understood and applied the standard to the facts of this case. Therefore I cannot agree with the majority's decision which desperately grasps at empty space for some reason to remand this case to the District Court. (Emphasis added.)

The imposition of this new "legitimacy" standard is not only a departure from, but directly in conflict with *Burdine*, which expressly teaches that the burden of persuasion and proof in a Title VII case always remains with the Plaintiff.

In describing the burden of the Defendant in a Title VII case, *Burdine* taught:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. (Citation omitted.) It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided

> must be legally sufficient to justify a judgment for the defendant.

450 U.S. at 235-36.

This Court also teaches that Title VII was not intended to diminish traditional management perogatives. Id., at 260.

The legitimate non-discriminatory reason required of the employer by *Burdine* to rebut a prima facie Title VII case has never been subject to the good business judgment rule. Title VII provides no recourse for employees suffering from bad business decisions unless those decisions discriminate upon prohibited bases. Title VII provides no entitlement to an employment dismissal for cause. It is undisputed that under Title VII, an employee can be dismissed from employment for any reason or no reason so long as it is not for prohibited discrimination. See *McDonald* v. *Santa Fe Trail Transport. Company*, 427 U.S. 273, 283-84 (1976), *Bishop* v. *Wood*, 426 U.S. 341, 349-51 (1976).

A legitimate reason is one clearly sufficient to dispel the inference of discrimination and affords plaintiffs an opportunity to show pretext. *Daniels* v. *Board of Education of Ravenna City School*, 805 F.2d 203 (6th Cir. 1986). Legitimate, non-discriminatory reasons found sufficient to rebut a prima facie Title VII case include a mere personality conflict, *Donnellon* v. *Fruehauf Corporation*, 794 F.2d 598, 601 (11th Cir. 1986), *McCollum* v. *Bolger*, 794 F.2d 602, 610 (11th Cir. 1986),* and an employer's loss of confidence in his immediate subordinate. *Pendleton* v. *Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980). A conflict of interest was a legitimate non-discriminatory reason for discharge in *Jones* v. *Flagship International*, 793 F.2d 714 (5th Cir. 1986), where an E.E.O.C. compliance manager for an employer

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* A personality conflict was found to exist in the case at bar by the trial court.

was discharged after encouraging employees to pursue discrimination grievances against the company, when her job was to discourage and defend the claims on behalf of the company. Even personal animosity toward an employee is considered a legitimate non-discriminatory reason sufficient to rebut a prima facie case of intentional sex discrimination under Title VII. *Nix* v. *W.L.C.Y. Radio/Rahall-Communications*, 738 F.2d. 1181, 1187 (11th Cir. 1984).

Given the context of the relationship between the parties in dispute, the non-discriminatory reason given for respondent's dismissal is imminently reasonable and of common experience. The record establishes that the Superintendent not only articulated a non-discriminatory reason, but also in fact, relied upon that reason when dismissing the respondent. The record shows that the chief administrative officer of the school district lost trust and confidence in his personal executive secretary because of her failure to inform him of a direct distribution of a document to his board of directors, *and* because of respondent's subsequent explanation that she, herself, did not trust him with that information. Establishing and maintaining a trust relationship was an absolute necessity in respondent's employment position.

The petitioners consistently asserted that the simple act of informing the Superintendent of the existence and delivery of the Salary Study would have satisfied the Superintendent and would have prevented the jeopardy of the confidential relationship they shared. The simple act of informing the Superintendent would not have interfered with respondent's involvement in, expression of opinion in, and authorship of, the substantive objections and complaints of perceived discrimination *nor* with the Salary Study's delivery to the Board of Education. This is a distinction which the Seventh Circuit refused to acknowledge. Respondent simply failed to live up to the Superintendent's expectations of her in terms of keeping him informed and

abreast of the happenings in the School District. For that reason, she was dismissed from employment.

The Seventh Circuit's concern for the "legitimacy" of the non-discriminatory rationale of the employer seems to be predicated on a misapplication of the distinction between the respondent's employment position as an executive secretary who must maintain a close-working relationship of trust and confidence with her employer, and that of the factory line workers and manufacturing employees who were involved in the case *E.E.O.C.* v. *Crown Zellerbach Corporation*, 720 F.2d 1008 (9th Cir. 1983). As long ago as 1968, in the decision of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) the Supreme Court has countenanced a different treatment of protectable interest for employees who enjoy a confidential, close-working relationship with their employer. See 391 U.S. at 570 f.n. 3. Also see *Connick* v. *Meyers*, 461 U.S. 139 (1983) and *Hochstadt* v. *Worcester Foundation*, 545 F.2d 222 (1st Cir. 1976). The close-working relationship of the respondent to the Superintendent was ignored by the Seventh Circuit.

There never has been required by an opinion of the Supreme Court or Courts of Appeals, some qualitative or quantitative analysis of the non-discriminatory reason proffered by an employer to determine whether the reason comports with some predefined level of "legitimacy". However, the Seventh Circuit has nonetheless been the first Court to establish such an analysis and has not even given the trial court, or the petitioners, any indication as to what standard of "legitimacy" would satisfy this new standard upon remand.

Thus, the Seventh Circuit has created a confusing precedent, conflicting with *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), an important landmark decision of this Court, likely to generate confusion

among the other circuits. Consideration of this matter by this court is essential.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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March 3, 1987

APPENDIX

No. 85-1916

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

KATHRYN M. JENNINGS, *Plaintiff-Appellant,* *vs.* TINLEY PARK COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 C 2231 Thomas R. McMillen, *Judge*

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. TERENCE T. EVANS, *District Judge**

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Honorable Terence T. Evans, District Judge for the Eastern District of Wisconsin, is sitting by designation.

December 5, 1986

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In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1916

KATHRYN M. JENNINGS,

Plaintiff-Appellant,

v.

TINLEY PARK COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146; ROBERT W. PROCUNIER, SUPERINTENDENT OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146; and THE BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 2231—**Thomas R. McMillen**, *Judge.*

ARGUED FEBRUARY 13, 1986—DECIDED JULY 21, 1986

Before CUDAHY and COFFEY, *Circuit Judges*, and EVANS, *District Judge.**

CUDAHY, *Circuit Judge.* Plaintiff, Kathryn Jennings, brought a Title VII action against defendants alleging that 1) her employer's policy, which denied overtime wages to secretaries, who were all female, but granted overtime

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* Honorable Terence T. Evans, District Judge for the Eastern District of Wisconsin, is sitting by designation.

wages to custodians, who were all male, discriminated on the basis of sex; and 2) her discharge was in retaliation for her participation in preparing and delivering a salary study to the Board of Education. The district court ruled for defendants on both claims. We affirm the district court on the underlying Title VII claim and vacate the judgment on the retaliation claim and remand this branch of the case for a new determination.

I.

Jennings served as a secretary to Robert Procunier, Superintendent for Tinley Park Community Consolidated School District No. 146, from November 1973 until June 1979. During that period District 146 employed two groups of employees that it designated as "Class I" employees, secretaries and custodians. "Class I" employees were noncertified,[1] full-time, salaried employees. All secretaries were female; all custodians were male. Custodians were paid one and one-half times their hourly rate for overtime work. Before a custodian was paid overtime his supervisor had to authorize the overtime work. Secretaries were not paid for overtime work. Defendants argued that this was because the secretaries were never required to work overtime.

Beginning in February 1979 the secretaries expressed concern that they were not being paid for overtime, which they asserted that they did in fact perform. The secretaries organized themselves into a "secretarial group" and attempted to meet with Procunier. Procunier refused to meet with the secretaries, but he was aware of their concerns from discussions he had had with Jennings. The secretaries did, however, meet with Assistant Superintendent Noel Swinford. The secretaries also attended a Board meeting to express their opposition to a salary schedule

[1] A noncertified employee does not hold an Illinois certificate for school administration, teaching or a specialized job such as school psychologist.

promulgated by Procunier. Despite their efforts, the Board passed the salary schedule. In response, the secretaries prepared a salary study, of which Jennings was the primary drafter. The study was delivered to the Board and Procunier on June 1, 1979.

Subsequently Procunier expressed his displeasure at not having received a copy of the study in advance of its distribution to the Board. The working relationship between Procunier and Jennings changed. He became distant. He stopped his practice of going through the mail with Jennings and even removed a chair from his office so that she would have no place to sit. He instructed her not to answer calls on his personal telephone line.

On June 15 Procunier told Jennings that she had not been loyal and supportive and that he would recommend to the Board that she be terminated. The Board left the matter to Procunier's discretion. The reasons for her discharge were explained in a letter:

> It is with considerable reluctance that I terminate your employment as my secretary. Although your technical and professional competence have been outstanding throughout the period of your employment, events of the past 2-3 weeks have generated serious questions relative to your ability to serve me or the Board of Education in an effective manner as required.
>
> The very important element of mutual trust and support which is so essential in the relationship of a personal secretary to the administrator responsible for an operation similar to this school district, has been seriously undermined. As a result of your reluctance to inform me of actions which you and other secretaries took relative to communication with the Board of Education, you have created a situation which is antagonistic to the close, confidential working relationship which is necessary in this office. The deterioration of the level of trust and support leaves no alternative open to me.

It was stipulated that Jennings demonstrated outstanding skills, performed her work well and that defendant had no reason to fire her based on her job performance. Plaintiff continued to perform her work competently after June 1 and Procunier had no reason to believe that she would disseminate confidential material.

Plaintiff brought an action under Title VII. Count I of her Amended Complaint alleged that she had been subjected to unfavorable disparate treatment based on sex. Count II alleged that she was terminated in retaliation for her opposition to the allegedly disparate treatment. Count III alleged the same discriminatory acts on behalf of similarly situated individuals. Class certification was granted. The case was tried before Judge McMillen sitting without a jury in May 1985. At the close of all the evidence he entered judgment for defendants on all counts. No written findings of fact or conclusions of law were made.

II.

Title VII of the Civil Rights Act of 1964 prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Supreme Court held that a plaintiff may state a claim of sex-based discrimination in compensation under Title VII without proving that he or she was performing a job substantially equal to that held by a higher-paid member of the opposite sex. *See Boyd v. Madison County Mutual Insurance Co.*, 653 F.2d 1173, 1177 (7th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982). However, neither *Gunther* nor *Boyd* set forth the elements of a prima facie case of sex discrimination when the plaintiff alleges that one category of employees of one sex is discriminatorily denied a benefit that is extended to another category of employees of the opposite sex. *See Gunther*, 452 U.S. at 166 n.8.

It is likely, although perhaps not beyond dispute, that plaintiffs have established a prima facie case. In *Boyd* an insurance company classified its employees as management personnel, claims adjustors or clerical workers. Both the management personnel and the claims adjustors were considered "professional" employees. All of those positions were filled by men. All of the clerical employees were women. The insurance company adopted a policy under which attendance bonuses were paid to clerical employees, but not to the other employees. Plaintiff, one of the management personnel, alleged that this policy discriminated against him on the basis of his sex in violation of Title VII. We held that plaintiff had established a prima facie case of sex discrimination. "Women were eligible for bonuses. Men were not." *Boyd*, 653 F.2d at 1178. Similarly, plaintiffs in the case before us have gone a long way toward establishing a prima facie case. All of the secretaries were women; all of the custodians men. Custodians were paid overtime. Secretaries were not.[2]

Once a prima facie case is established, the burden shifts to the defendant to show that the difference in treatment was based on a legitimate, nondiscriminatory reason. *See Boyd*, 653 F.2d at 1178. If the defendant successfully carries this burden, then the plaintiff may demonstrate that the offered reason is merely a pretext for discrimination. *Id.*

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[2] Defendant argues that plaintiffs did not establish a prima facie case because there were other salaried employees for whom plaintiffs did not present evidence of discrimination. "Class II" and "Class III" employees, who include nurses and teacher aides, are also salaried employees. They are not included in "Class I" because they do not work fifty-two weeks a year. *Arguendo*, we shall assume that to establish a prima facie case plaintiffs need only show a difference in treatment between two major groups of employees of different sex even though the two groups do not exhaust the relevant employee pool (as was apparently the case in *Boyd*). It may well be that the plaintiffs do not need to exhaust the relevant employee pool to establish a prima facie case, but that the defendants may introduce evidence of how other employee groups are treated to defeat the prima facie case.

The district court apparently thought that defendant had established a legitimate, nondiscriminatory reason for paying custodians for overtime but not secretaries. The district court found that "the type of work [secretaries] do is different and the reasons the custodians are required to stay over is [sic] different from the reason that the secretaries stay over, whether required as a matter of practice or simply as a voluntary act." Tr. at 363.

> [Custodians] have to do their work before they go home in order to have the school ready for work the next day. . . . So that if a storm comes or if there happens to be some vandalism or perhaps just an unduly dirty classroom, those employees can be asked to stay overtime [to remove snow from sidewalks or to clean the school].

Tr. at 361. The district court found that the secretaries are in a different situation.

> Now, as far as the secretaries are concerned, the evidence is that they are seldom, if ever, requested to stay overtime and that they can get their work done during the seven and a half or eight hours that they are in the school building. If they don't get it done on the one day, they can do it on the next day. On the other hand, I don't attach too much significance to the fact that secretaries in many instances, can't get their work done in seven and half hours—Mrs. Gerrisen's testimony was rather clear to that effect—and that they stay over in order to finish it. I don't consider that entirely voluntary.

Tr. at 363.

Although the findings of the district court are not as clear as they might be, we shall attempt to interpret and restate them. The requirement for custodians to work overtime was exigent—there was a specific overtime requirement to correct immediately a condition that would obviously interfere currently with efficient operation of the school. That is, an unshoveled sidewalk, a vandalized building or a dirty classroom presented an exigent prob-

lem calling for immediate action (even on overtime) to remove an obvious obstacle to school operations.

On the other hand, whatever overtime requirement was imposed on secretaries resulted from their having more work to do than could be completed during their regular work hours. The district court notes that in most cases they could put work off until the next day. There was no specific demand for work to be done *now* to permit the school to function. We believe that the district court's various comments on the demands of secretarial work may be characterized as suggesting only this sort of overtime requirement, if there was one at all.

We think these two distinct sorts of job requirements could call for different responses from management, which would have been based on legitimate and nondiscriminatory reasons. At least, we think the trier of fact could find the reasons to be legitimate, nondiscriminatory and nonpretextual and we may not conclude that his determination is clearly erroneous. Thus the treatment of custodians vis-a-vis secretaries may not have been good personnel management—or even entirely fair—but we think the district court could find that it did not implicate Title VII. We think this conclusion is also suggested by the fact that plaintiff did not show that *all* of the relevant employees were subject to disparate treatment, even though we have not held that such a showing is always necessary to establish a prima facie case. *See supra* note 2.

III.

Plaintiff's second claim is that she was discharged in retaliation for her opposition to defendant's employment practices. Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). To determine whether there has been a retaliatory discharge under this section, a court must assess the evidence by using the three-part procedure set forth by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) and *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973). *See Klein v. Trustees of Indiana University*, 766 F.2d 275, 280 (7th Cir. 1985). First, the plaintiff must prove a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse action. Third, if the defendant carries its burden, the plaintiff has an opportunity to prove that the stated reason was not the defendant's true reason for acting, but was a pretext for discrimination.

To establish a prima facie case of retaliatory discharge, the plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) that there is a causal link between the protected expression and the adverse action. *See Klein*, 766 F.2d at 280; *EEOC v. Crown Zellerbach Corporation*, 720 F.2d 1008, 1012 (9th Cir. 1983). Section 2000e-3 does not require that the challenged employment practice actually violate Title VII; it is sufficient if the plaintiff has a reasonable belief that there is a Title VII violation. *See Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980). The district court found that plaintiff had established a prima facie case. Defendant argues, however, that the necessary causal link was not established because Procunier was not aware that plaintiff had drafted the salary study. However, Jennings gave a copy of the salary study to Procunier on June 1 and thus he was aware of her involvement with the study. Further, the copy of the study that Procunier received had Jennings' signature on the front as one of the "Committee of Concerned Secretaries." Procunier therefore had reason to be aware of her involvement in drafting the study. In any case we do not find the district court's implied factual finding that there was a causal link clearly erroneous.

The crux of the disagreement between the parties centers on whether defendant articulated a legitimate, nondiscriminatory reason for plaintiff's dismissal. Defendant argues that Jennings was fired because she failed to inform the Superintendent of the existence of the study and its delivery to the Board, and consequently he felt that he could no longer trust her and count on her loyalty.[3] Plaintiff argues that this is not a legitimate, nondiscriminatory reason under section 2000e-3.

We note initially that the district court may have used the wrong standard to determine whether defendant had carried its burden under part two of the *Burdine* test. The district court seems to take the position that any reason offered by the defendant is sufficient to discharge its burden and to shift the burden to the plaintiff to prove that the reason is a pretext.[4] Defendant, however may

[3] The district court stated that the reason she was discharged "was that she went over his head . . . and thereby lost his trust and confidence." Tr. at 368. Yet at another point the court stated that "he was not opposed to an employee going directly to the Board . . . ." Tr. at 456. At still another point the court refers to a "personality conflict that developed rather quickly, triggered, perhaps, by the fact that he felt that she was not being fair with him and taking this matter directly to the Board without discussing it with him or asking him to submit it to the Board." Tr. at 457.

[4] The district court stated:

> *Whether the reason was good or bad*, as I said yesterday, and I think the parties realize, *is not the issue*. An employer can make bad mistakes—and we see them in these cases rather frequently—and they are offensive to the employee who files the lawsuit. But as long as the bad mistake is not one based on a violation of Title VII, in this case retaliation because of advocacy of some kind of policy that the plaintiff believed was to correct an enequity [sic] under Title VII, as long as that is not the reason, *it doesn't make any difference what the reason is*. . . . If you don't prove the motivation that is required by the statute or don't prove that the given motivation is a pretext so that the motivation required by the statute is present, then the plaintiff can not recover.

Tr. at 459 (emphasis added); *see also* Tr. at 452 ("Whether the reason was justified or good business judgment is not the issue. It is whether or not it existed.").

not offer merely any nondiscriminatory reason for the discharge. Defendant must offer a *legitimate* reason. It is unclear whether the district court thought that the defendant had offered a legitimate, nondiscriminatory reason.[5] Consequently, we think that the more prudent course of action is to remand the retaliation claim to the district court so that it may be reconsidered in light of our observations.

Further, we think that there is some reason to doubt whether defendant presented a legitimate, nondiscriminatory reason for the discharge. As the Ninth Circuit has noted, almost every form of opposition to an employment practice is in some sense disloyal. *See EEOC v. Crown Zellerbach Corporation*, 720 F.2d 1008, 1014 (9th Cir. 1983). If mere "disloyal" conduct could provide a legitimate basis for discharge, the protection extended by section 2000e-3 would be severely limited.

In *Crown Zellerbach* the defendant was to receive an award from the Los Angeles School District, a significant customer, for a project funded by Crown Zellerbach that was designated to provide special career guidance for students in a predominantly Hispanic school. The plaintiffs, who were employees of Crown Zellerbach, wrote a letter to the school board to inform it of "the bigoted position of racism at Zellerbach" and of various discrimination charges that had been filed against the company. The defendant fired the plaintiffs for "disloyalty." We think that *Crown Zellerbach* is markedly similar to the case before us.

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[5] In a different case we might be willing to assume that the district court had found the proffered reason to be legitimate. In this case, however the judge was apparently not entirely familiar with the law of retaliatory discharge. For example, he initially thought that the retaliation claim could only succeed if plaintiff won on her substantive Title VII claim. *See* Tr. at 371. Further, the district court judge made some of his factual findings on the retaliation claim while under this misimpression. *See* Tr. at 368.

The Ninth Circuit applied a reasonableness test to determine whether the conduct could provide a legitimate basis for discharge. The court, in holding for the plaintiffs, distinguished an earlier case that had held that an act of disloyalty may provide a sufficient basis for discharge. In the earlier case the plaintiff's actions had "resulted in poor work performance by her and also in diminished performance and reduced morale in other employees who worked with her. . . . [She] would have been fired based on her employment performance alone even had she not opposed the institute's employment practices." *Crown Zellerbach*, 720 F.2d at 1014-15 (footnote omitted).

Defendant argues that Jennings' failure to inform Procunier of the study was "fatally disruptive to the operations of the District and the relationship between Plaintiff and Defendant." We agree that there appears to have been some disruption. However, any disruption may be viewed as the product of Procunier's reaction to plaintiff's conduct, not necessarily of plaintiff's conduct itself. We do not find any evidence that Jennings' performed her job any less competently. Defendant also argues that plaintiff's actions were disruptive because they caused Procunier to lose trust in her. This argument is an attempt to say that "disloyal" conduct is always disruptive, and therefore a justification for discharge, at least so long as defendant claims that trust is a job requirement and he or she has lost trust. This argument, if adopted, would undermine section 2000e-3, in the same way that the argument that "disloyalty" justifies discharge would.[6]

For these reasons we remand this case for further findings (and for evidentiary proceedings if necessary), rather

[6] The dissent's approach would in effect deprive employees whose jobs require the trust and confidence of their employers the protection of section 2000e-3. Such an employer could, under the dissent's approach, avoid a claim of retaliatory discharge by unilaterally bringing about a change in the working relationship with the employee and then claiming that a "loss of trust" has caused a "disruption" in the workplace.

than attempting to decide it on the record before us, because the district court's comments do not make clear exactly what reason the court thought defendant had proven, nor do they provide an adequate basis for us to decide whether the analysis of *Crown Zellerbach* applies.

It is entirely possible that under all the circumstances Procunier showed a "legitimate" reason for the discharge. But, because a sense of "disloyalty" is inherent in almost any assertion of Title VII rights, we think it essential to determine whether the alleged disloyalty here constituted a legitimate business reason under the *Crown Zellerbach* test or was of a sort that is not cognizable as a defense to a retaliatory discharge claim.

For the reasons stated above, we affirm the district court's judgment on the section 2000e-2(a)(1) claim and remand the retaliatory discharge claim to the district court for further proceedings consistent with this opinion.

COFFEY, *Circuit Judge*, concurring and dissenting. I join the majority opinion to the extent that it holds that the plaintiff failed to establish a Title VII sec. 2000e-2(a)(1) violation based on the defendants' overtime wage policy. I agree with the majority's conclusion that there is adequate evidence in the record to support the district court's finding that the defendants offered overtime hours to custodians based on considerations other than sex. However, I cannot join that part of the majority's opinion which asserts that the district court "may have used the wrong standard to determine whether the defendant had carried its burden under part two of the *Burdine* test," nor can I agree with the majority's unwarranted usurpation of the district court's responsibility for assessing the credibility of testimony elicited in its presence. Accordingly, I dissent from that portion of the majority's opinion directing a remand of this case for clarification of the district court's allocation of burden of proof and production on the retaliatory discharge claim, and for further inquiry into the rea-

sons proffered by the defendants for their discharge of the plaintiff.

The record in this case clearly demonstrates that the district court understood and applied the proper standard of review when determining whether the defendants had met their burden of production under the *Burdine* test. The majority in a futile attempt to support its fallacious reasoning excises small sections of the record which, if read separately and apart from the overall discussion by the district court of the defendants' burden of production, could suggest that the trial court misconstrued the defendants' responsibility under part two of the *Burdine* test. However, a careful reading of the entire record relating to the allocation of burdens of production and persuasion under *Burdine* clearly establishes that the district court understood and properly applied the *Burdine* test to the facts of this case.[1]

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[1] The following statements by the district court make this clear:

"I realize that the state of the law puts a very heavy burden on the plaintiff once the defendant articulates a business or *non-discriminatory* reason for the discharge." Tr. at 455 (emphasis added).

* * * *

"Now, that is a matter that you may say is not a good reason for a discharge, and the answer is that it doesn't make any difference whether it is a good reason as long as that was the reason and the reason was not because of a protest of the unfair or illegal employment practice." Tr. at 368.

* * * *

"But I think that we have to remember that there is a second point and that is that the cases defeat that claim if the employer can show a bona fide business reason for the discharge. That is where I think the plaintiff's case at this point is fatally defective." Tr. at 373.

* * * *

"Now, beyond that, though, if the employer articulates and shows by competent testimony that the reason for the discharge was not because of some employment practice she was protesting—whether it was an unlawful employment practice

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It is the majority that apparently misunderstands and misconstrues part two of the *Burdine* test. Contrary to the ruling case law, the majority's position would require the defendant to establish something more than that it discharged the plaintiff for non-discriminatory reasons. Not only does this misinterpret the *Burdine* test, but, in effect, effectively shifts the burden of persuasion to the defendants which, as we pointed out in *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985), clearly is not the function of part two of the *Burdine* test: "(t)he defendant's burden in presenting a legitimate, non-discriminatory reason for its actions is only a burden of production; the burden of persuasion rests at all times on the plaintiff." *Klein*, 766 F.2d at 280 (citation omitted). As the Supreme Court noted in *Burdine*, the purpose of shifting the burden of production in these cases is to "bring the litigants and the court expeditiously and fairly" to the ultimate issue of whether the defendant's discharge of plaintiff was retaliatory. *Burdine*, 450 U.S. at 253.

Since the burden of production does not shift to the defendants until the plaintiff has made out a prima facie case establishing a discriminatory motive, it only stands to reason that the defendant meets its burden of production by introducing evidence that controverts the plaintiff's prima facie case of discriminatory motive. In other words, the defendants effectively rebut the presumption of discriminatory motive and force the plaintiff to her ultimate burden of establishing that the defendants' explanation for her

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[1] *continued*

or not really doesn't enter into that—but shows that he had a business reason for the discharge not related to the employment practice, then the burden shifts back to the plaintiff to show that that was a pretext." Tr. at 368.

Even plaintiff's counsel characterized the burden in this manner:

"We would submit, your Honor, that once the business reason is established, I don't think that we have to prove that it was, again, because of intentional discrimination against women, you know, down-trodding and all that." Tr. at 369.

discharge is merely a pretext, *see Burdine*, 450 U.S. at 254, simply by proffering an explanation that is non-discriminatory. A non-discriminatory reason is a legitimate reason sufficient to meet the defendants' burden of production under part two of *Burdine*. In this case, the record is clear that the district court understood and applied this standard to the facts of this case. Therefore, I cannot agree with the majority's decision which desperately grasps at empty space for some reason to remand this case to the district court.

I also disagree with the majority's reasoning in second-guessing the district court's determination that the breakdown in the relationship between Procunier[2] and the plaintiff was the primary motive behind Procunier's decision to discharge the plaintiff. The majority's suggestion that disloyalty[3] is at best a dubious explanation for an employee's discharge where prior to the discharge the employee had expressed opposition to an employment practice puts this court in the position of second-guessing a credibility determination made by the district court—a court that was in a far better position to evaluate the credibility of the witnesses and to weigh the conflicting testimony.[4] Such second-guessing seems particularly un-

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[2] Procunier was superintendent of the defendant school district and plaintiff's immediate supervisor.

[3] The majority incorrectly characterizes the defendants' explanation for plaintiff's discharge as based only on disloyalty. The record is clear that loyalty was only one of the factors considered by Procunier in his decision to discharge the plaintiff. He considered her to be untrustworthy and thus had a lack of confidence in her ability to perform in the executive position she held.

[4] Rule 52(a) of the Federal Rules of Civil Procedure provides in part that:

> "(F)indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

Moreover, the advisory committee notes to Rule 52(a) explain that:

> "(t)o permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy

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justified where the record below is replete with facts that substantiate the defendants' explanation for plaintiff's discharge. Both the plaintiff and Procunier testified that communication between them broke down after the plaintiff had submitted the wage study to the school board without his knowledge or approval. Plaintiff testified that she and Procunier no longer worked together on projects they had performed jointly before their problems began. Procunier testified that he felt he could no longer trust the plaintiff with important confidential matters, and thus refused to give the plaintiff assignments which involved problems of this nature.

Despite significant factual distinctions between this case and *Crown Zellerbach*, the majority asserts that *Crown Zellerbach* should control our disposition of the case before us. In *Crown Zellerbach*, the court noted that "it has never been disputed that the sole reason for the discharge was the letter" expressing opposition to the defendants' employment practices. *Crown Zellerbach*, 720 F.2d at 1011. In our case, the defendants contend that it was *not* the plaintiff's opposition to their employment policies that motivated the decision to discharge the plaintiff, and un-

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[4] *continued*

of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Furthermore, this court has repeatedly stated that credibility determinations are not appropriate for appellate review absent extraordinary circumstances:

> "We defer to the trial court on issues of credibility absent clear error." *Walsh v. Brewer*, 733 F.2d 473, 477 (7th Cir. 1984) (citation omitted).
>
> "We are not inclined to make a fresh appraisal of the credibility of witnesses whom the trial judge saw and heard." *Denison Mines, Ltd. v. Michigan Chemical Corp.*, 469 F.2d 1301, 1310 (7th Cir. 1972) (Stevens, circuit judge).
>
> "Questions of credibility were properly resolved by the trial court and are not to be considered on appeal." *Mathews v. James Talcott, Inc.*, 345 F.2d 374, 381-82 (7th Cir. 1965).

like *Crown Zellerbach*, the circumstances surrounding the plaintiff's discharge lend credibility to the defendants' explanation for their decision and thus support the district court's determination that the defendants had a legitimate reason for terminating the plaintiff.

In *Crown Zellerbach*, *all* of the employees who expressed opposition by signing the letter were discharged by the defendants. Moreover, Crown Zellerbach had a history of discrimination problems: the EEOC had, prior to the events which gave rise to the suit itself, determined that Crown Zellerbach's practices were "discriminatory in certain respects." 720 F.2d at 1010. In the case before us, the plaintiff was the only member of the "opposition group" who was discharged after the study prepared by the group was presented to the school board, even though in the past she had voiced objections without any repercussions. Moreover, the record makes clear that Procunier supported the opposition group: he encouraged the group to hold meetings and even attended one of the meetings; he testified that he supported the group's position with respect to overtime pay and that he was not opposed to an employee going directly to the school board with grievances.

Finally, and perhaps most importantly, the plaintiff Jennings in this case, *unlike* the warehouse employees discharged in *Crown Zellerbach*, occupied a position of significant responsibility and trust as well as confidence.[5]

[5] My position does not, as the majority asserts, allow employers to "avoid a claim of retaliatory discharge by unilaterally bringing about a change in relationship with the employee and then claiming that a 'loss of trust' has caused a 'disruption' in the workplace." I make it eminently clear in my dissent that "trust" and "confidence" are very legitimate considerations in the determination of whether or not to discharge an "executive secretary." This record is most clear that the termination of the plaintiff was not retaliatory but was required if the executive office was to continue to operate in a proper business-like environment, and strange as it may seem it is not the function of this court to second-guess

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A warehouse employee's (laborer's) responsibilities and duties do not require a close and confidential relationship with an employer. In contrast, as executive secretary, the plaintiff had access to the most highly confidential information in the organization as well as personal information of the employer. The ability of the employer to trust and to work closely with his executive secretary is paramount and essential to the orderly and efficient operation of any office. When the trust and the confidence upon which the relationship between an executive secretary and the employer breaks down to the point where communication between the two is disrupted and thereby interferes with the operation of the office, the relationship, for all practical purposes, has come to an end; discharge merely formalizes that which both persons already knew was bound to come.

Beyond doubt the confidentiality and trust that must exist between an executive secretary and the employer are bona fide occupational requirements of the position of executive secretary and thus the plaintiff's employment is clearly distinguishable from that of the warehouse employees (laborers) in *Crown Zellerbach*. The majority's comparison between the plaintiff's position as an executive secretary and the warehouse employees in *Crown Zellerbach* is ridiculous and almost not worthy of comment. Therefore I cannot agree with the majority's decision to remand this case to the district court for further inquiry into the legitimacy of the defendants' explanation for the plaintiff's discharge in light of the overwhelming evidence supporting the district court's conclusion that the plaintiff was not terminated because of her opposition to the defendants' employment policies. Since the record contains sufficient evidence to support the district court's conclu-

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[5] *continued*
the trial court's decision that the defendants had presented sufficient credible evidence to establish that the discharge of the plaintiff was motivated by legitimate considerations of "trust" and "confidence."

sion that the plaintiff failed to establish her claim of retaliatory discharge, and further, because the court found the defendant's testimony credible, a finding clearly not erroneous, the majority, in remanding this case to the trial court, has invented a new standard of review not supported in case law, I must dissent.

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